



JUN 8 9 17 AM '00

HEARINGS OFFICE

OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of)	PCH-2000-4
)	
BROWNING-FERRIS INDUSTRIES)	HEARINGS OFFICER'S
OF HAWAII, INC.,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Petitioner,)	AND DECISION
)	
vs.)	
)	
STATE OF HAWAII, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Respondent.)	
)	
and)	
)	
THE KNG GROUP, INC.,)	
)	
Intervenor.)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION

I. INTRODUCTION

On or about March 2, 2000, Browning-Ferris Industries of Hawaii, Inc. ("Petitioner"), filed a request for an administrative hearing pursuant to *Hawaii Revised Statutes ("HRS") §103D-709*. The purpose of the request was to contest the denial of Petitioner's protest in connection with the Department of Transportation, State of Hawaii's ("Respondent"), proposed award to The KNG Group, Inc. ("KNG"), of the contract for DOT Project No. E01522-99, pertaining to Furnishing Refuse Collection and Disposal Service at The Honolulu International Airport.

The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On March 20, 2000, the parties filed a Stipulation to Allow Intervention of The KNG Group as an additional party and on March 23, 2000, the parties stipulated to continue the hearing to April 4, 2000.

On March 13, 2000, Respondent filed a Response to Petitioner's Request for Hearing¹. On March 31, 2000, KNG filed a Memorandum in Support of Respondent Department of Transportation's Determination. Respondent and Petitioner filed prehearing briefs on March 31, 2000. On the same date, the parties filed Stipulated Facts.

The matter came on for hearing before the undersigned Hearings Officer on April 4, 2000, in accordance with the provisions of the Hawaii Public Procurement Code, HRS Chapter 103D ("Procurement Code"). Petitioner was represented by Peter W. Olson, Esq. Respondent was represented by Wayne A. Matsuura, Esq. and KNG was represented by Howard T. Chang, Esq.

At the conclusion of the hearing, the Hearings Officer requested that the parties submit written closing arguments and proposed findings of fact and conclusions of law. Petitioner filed its closing argument on April 14, 2000; Respondent and KNG filed their closing arguments on April 20, 2000; and Petitioner filed its rebuttal on April 26, 2000. The parties filed their proposed findings of fact and conclusions of law on May 12, 2000.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision. The parties' stipulated facts and proposed findings and conclusions were adopted to the extent that they were consistent with the established factual evidence and applicable legal authority, and were rejected or modified to the extent that they were inconsistent with established factual evidence and applicable legal authority, or were otherwise irrelevant.

¹ On the same date, KNG filed a motion to intervene in the administrative hearing. KNG subsequently withdrew the motion in lieu of the stipulation allowing it to intervene in this proceeding.

II. FINDINGS OF FACT

1. On or about July 22, 1999, Kazu Hayashida, Respondent's Director, issued a Notice To Bidders for Specifications And Proposal For Furnishing Refuse Collection And Disposal Service At The Honolulu International Airport, Honolulu, Hawaii, Island of Oahu, Project No. E01522-99 (1999)("Project").

2. Pursuant to the notice to bidders, the date set for the submission and opening of bids was August 19, 1999.

3. Ms. Jamie Ho was the Contracts Engineer for Respondent who reviewed the bids for the Project.

4. KNG submitted a Notice of Intent to Bid on August 6, 1999. The notice was signed by Kris Gourlay ("Gourlay"), as "Owner."

5. Four parties submitted bids on August 19, 1999 for the Project, including Petitioner and KNG.

6. On August 19, 1999, the bids were opened. The lowest bid was that of KNG for \$1,311,690.00. The second lowest bid of \$1,558,332.00 was submitted by Petitioner.

7. After the bid opening, Respondent began evaluating the bid received from KNG.

8. By letter dated September 22, 1999 from Petitioner's attorney to Respondent, Petitioner protested the bid submission of KNG on the asserted ground that KNG was not a "responsible bidder." Petitioner requested that the subject contract instead be awarded to Petitioner as the second lowest bidder.

9. By letter dated October 6, 1999, Ms. Ho requested that KNG complete and return a Standard Qualification Questionnaire ("SQQ"), to Respondent.

10. Under cover of a letter dated October 28, 1999, Gourlay returned the completed SQQ to Respondent.

11. Gourlay's October 28, 1999 cover letter states that Pacific Waste Services, Inc. ("PWS") and SEI Solid Waste, Inc. ("SEI") are KNG's "intended project subcontractors."

12. As of August 19, 1999, KNG did not own any refuse collection trucks or any refuse collection containers, or own any necessary equipment, and at the present time KNG does not own any such equipment. However, in the SQQ, KNG represented to Respondent that it has the necessary commitments to obtain such equipment once the contract is awarded to KNG.

13. As of August 19, 1999, KNG did not own or lease a site from which to operate and keep its refuse collection trucks, and at the present time does not own or lease such a site. However, in the SQQ, KNG provided Respondent with a copy of a proposed lease. Also, in a letter dated February 9, 2000 from KNG to Respondent, KNG represented that it has negotiated property leases with several property owners.

14. As of August 19, 1999, KNG did not have any employees, including any qualified drivers, mechanics, or welders, and at the present time does not employ any such persons. However, in the SQQ, KNG provided its Work Plan Outline and documentation for obtaining such employees.

15. As of August 19, 1999, and continuing to the present, KNG did not have any insurance covering refuse collection trucks; did not carry any worker's compensation insurance; and did not carry any general commercial liability insurance policy. However, in the SQQ, KNG provided to Respondent its Work Plan Outline and documentation for obtaining such insurance.

16. As of August 19, 1999, and continuing to the present, KNG did not have a commercial vehicle operating permit with the Public Utilities Commission or a City and County of Honolulu refuse collection permit. However, in the Work Plan Outline submitted by KNG to Respondent on October 28, 1999, and later in a letter dated February 9, 2000 from KNG to Respondent, KNG explained why it did not have such permits or licenses and submitted its plan for obtaining those permits and licenses.

17. As of August 19, 1999, and continuing to the present, neither PWS nor SEI has a City and County of Honolulu refuse collection permit. However, in a meeting on February 10, 2000 between Ms. Ho and Gourlay, Gourlay represented that PWS and SEI would obtain such permits.

18. As of the present time, neither PWS nor SEI are registered to do business in the State of Hawaii. However, both have obtained the necessary application forms to register.

19. As of the present time, PWS and SEI are not registered with the Department of Commerce and Consumer Affairs in a joint venture with KNG.

20. By letter dated February 9, 2000 to Respondent, KNG outlined its position on its responsibility and described how it planned to obtain the required resources, including the refuse license, equipment and facilities.

21. On February 10, 2000, Ms. Ho met with Gourlay for the purpose of discussing KNG's ability to perform the contract. Gourlay represented that if the project contract is awarded to KNG, KNG would be able to start within eight weeks using PWS and SEI as subcontractors.

22. By letter dated February 18, 2000, Respondent informed Petitioner's attorney that Respondent had determined that KNG is a responsible bidder and that Respondent therefore intended to award the contract to KNG, as the lowest responsible bidder.

23. By letter dated March 1, 2000 from Petitioner's attorney, Petitioner requested an administrative hearing of Respondent's determination.

24. The previous contract for the Project, advertised in 1995, was awarded to Petitioner who performed the contract until its expiration. Petitioner continues to perform the current contract as an emergency hire pending the awarding of a new contract.

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

A. Jurisdiction.

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review the determinations of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to *HRS §§103D-310, 103D-701 or 103D-702, de novo*. In doing so, the Hearings Officer has the authority to act on a protested solicitation or award in

the same manner and to the same extent as contracting officials authorized to resolve protests under *HRS §103D-701. Carl Corp. v. State Dept. of Educ., 85 Haw. 431 (1997)*. And in reviewing the contracting officer's determinations, the Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. *HRS §103D-709(f)*.

B. Determination of Responsibility.

The salient facts are not in dispute. In July 1999, Respondent issued a solicitation for bids to furnish refuse collection and disposal services at the Honolulu International Airport. Bidders were required to submit a notice of intention to bid ten days prior to the bid opening date. The date set for the submission and opening of the bids was August 19, 1999. Four bids were submitted. The lowest bid of \$1,311,690.00 was submitted by KNG. Petitioner's bid of \$1,558,332.00 was the second lowest bid. Following bid opening, Respondent began evaluating KNG's qualifications and, based upon information it received after August 19, 1999, informed Petitioner's attorney by letter dated February 18, 2000, that Respondent had found KNG to be a responsible bidder.

Petitioner complains that pursuant to *Hawaii Administrative Rules ("HAR") §§3-122-108 and 3-122-110*, Respondent was required to determine bidder responsibility upon receipt of the notices of intention to bid *and before the bids were opened*. *HAR §3-122-108(b)* states in relevant part:

Upon notification of the bidder's intent to submit an offer, the procurement officer shall determine whether the prospective offeror has the ability to perform the work intended.

Additionally, *HAR §3-122-110* provides in part:

Determination of nonresponsibility.

(a) The procurement officer shall determine, on the basis of available information, the responsibility or nonresponsibility of a prospective offeror.

(b) If the procurement officer requires additional information, the prospective offeror shall promptly supply the information. Failure to provide the requested

information at least forty-eight hours prior to the time advertised for the opening shall be considered unreasonable and may be grounds for a determination of nonresponsibility.

(c) Notwithstanding the provision of paragraph (b), the head of the purchasing agency shall not be precluded from requesting additional information.

(d) Upon determination that a prospective offeror is not fully qualified to perform the work, the head of the purchasing agency or designee shall afford the prospective offeror an opportunity to be heard. Upon conclusion of the hearing and if still of the opinion that the bidder is not fully qualified to perform the work, the head of the purchasing agency or designee shall refuse to receive or consider any offer made by the prospective offeror.

* * * *

According to Petitioner, the foregoing sections construed together, require the procurement officer to make the responsibility determination prior to bid opening.

The determination of bidder responsibility involves an inquiry into the bidder's ability and will to perform the subject contract as promised. Responsibility concerns how a bidder will accomplish conformance with the material provisions of the contract; it addresses the performance capability of the bidder, and normally involves an inquiry into the potential contractor's financial resources, experience, management, past performance, place of performance, and integrity. *Blount, Inc. v. U.S.*, 22 Cl.Ct. 221 (1990). See also *Federal Elec. Corp. v. Fasi*, 56 Haw. 54 (1974). "Responsibility . . . refers to a bidder's apparent ability and capacity to perform the contract requirements and is determined not at bid opening but at any time prior to award based on any information received by the agency up to that time." See *Peterson Accounting-CPA Practice, Comp Gen Decision No. 108,524* (1994)(emphasis added).

In contrast, bid responsiveness refers to the question of whether a bidder has promised to perform in the precise manner requested by the government with respect to price, quality, quantity, and delivery. *Blount, supra*. A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for

in the solicitation. *Bean Dredging Corp. v. U.S.*, 2 Cl. Ct. 519 (1991). Matters of responsiveness must be discerned solely by reference to materials submitted with the bid and facts available to the government at the time of the bid opening. *Blount, supra*. “The rule is designed to prevent bidders from taking exception to material provisions of the contract in order to gain an unfair advantage over competitors and to assure that the government evaluates bids on an equal basis.” *Blount, supra*, citing *Cibinic and Nash, Formation of Government Contracts (2nd Ed., 1986)*, p. 394.

In *Arakaki v. State of Hawaii, Dept. of Accounting and General Services, PCH-96-8 (June 23, 1997)*,² the Hearings Officer found that the low bidder was entitled to present information bearing on its responsibility at any time up to the awarding of the contract. In arriving at that conclusion, the Hearings Officer took notice of the decisions of the United States Claims Court and the comptroller general holding that a bidder may present evidence of responsibility after bid opening up until the time of the award. *Blount at 226 (citing Mack Trucks, Inc. v. United States, 6 Cl. Ct. 68, 71 (1984))*:

This conclusion is apparently based on the rationale that matters of responsibility are determined not at bid opening but at any time prior to award and further, that the information would not relieve the bidder from complying with the material terms and conditions of the solicitation. See *Peterson Accounting-CPA Practice, supra*. See also *Blount, supra*.

Cases construing Maryland’s model code-based procurement law have also reached the same conclusion. For example, in *Appeal of Peninsula General Hospital Medical Center, No. 1248 (MSCBA Aug. 19, 1985)*, the board found that information bearing on a prospective contractor’s ability to perform in accordance with the terms of the contract related to responsibility and might properly be received and evaluated after bid opening. And in *Appeal of Aquatel Industries, Inc., No. 1192 (MSBCA Aug. 30, 1984)*, the board similarly held that materials related to the

² The Hearings Officer’s decision was reversed by the Hawaii Supreme Court on other grounds. See *Arakaki v. State of Hawaii, Dept. of Accounting & General Services*, 87 Haw. 147 (1998).

determination of a bidder's responsibility could be submitted by the bidder after bid opening.

(Emphasis added).

Those decisions are equally applicable to the present situation. Moreover, HRS §103D-104 defines a "responsible bidder" as "a person who has the *capability* in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." (emphasis added). "Capability" refers to "*capability at the time of award of contract.*" HAR §3-122-1 (emphasis added). Accordingly, these definitions are consistent with the foregoing authorities and buttress the conclusion that responsibility may be determined at any time up to the awarding of the contract.

A reading of HAR §§3-122-108 and 3-122-110 does not lead the Hearings Officer to a different conclusion. Those provisions require the procurement officer to undertake to determine a bidder's responsibility once notified of the bidder's intention to bid. Neither section, however, requires the procurement officer to complete the responsibility determination *prior to bid opening*³. Indeed, such a conclusion would needlessly limit the procuring agency's ability to conduct a thorough evaluation into a bidder's qualifications to perform under the contract. The bidder would be required to comply with the material terms and conditions of the solicitation regardless of whether the responsibility determination is completed before or after bid opening⁴. Moreover, such a limitation would increase the

³ This conclusion is consistent with *Regulation 3-401.04 of The Mode Procurement Code for State and Local Governments, Recommended Regulations (American Bar Association)(1997)* which provides: "*Before awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible.*" (emphasis added).

⁴ Thus, the bidder would not receive an unfair advantage over the other bidders. This should be contrasted with the determination of bid responsiveness:

Responsiveness is determined by reference to when they are opened and not by reference to subsequent changes in a bid. (citation omitted).
Allowing a bidder to modify a nonresponsive bid when, upon opening the bids, it appears that the variations will preclude an award, would permit the very kind of bid manipulation and negotiation that the rule is designed to prevent. Otherwise bidders would be encouraged to submit nonresponsive bids on terms favorable to the government but subject to certain conditions, in the hope that if their bids were the top ones, they could then negotiate about and retain some of their proposed changes. In this way they could obtain a contract that they could not have received had they complied with the specification in the invitation for bids.

Tokyo Menka Kaisha, Ltd. v. United States, 597 F.2d 1371, 1376-77 (Ct. Cl 1979), cited with approval in *In the Matter of Southern Food Group, LP v. State of Hawaii, Department of Education*, 89 Haw. 443, 457 (1999).

possibility of an erroneous responsibility determination that may lead to the rejection of a qualified bidder or the acceptance of an unqualified one. Such a result would be contrary to the Procurement Code's intentions of fostering "broad-based competition among vendors" and increasing the public's confidence in the integrity of the system. *Senate Standing Committee Report No. S8-93, 1993 Senate Journal, at 39.* Based upon these considerations, the Hearings Officer concludes that Respondent was not required to arrive at a responsibility determination prior to bid opening but rather, has up to the awarding of the contract within which to determine whether KNG was a responsible bidder⁵.

C. Standards of Responsibility.

Petitioner argues that in any event, KNG was and is not a responsible bidder because it does not have the necessary business licenses and permits, employees, equipment, and business office or other facilities. Respondent and KNG do not dispute this contention; rather Respondent and KNG assert that Respondent's responsibility determination of KNG was nevertheless properly based upon Respondent's finding that KNG had the "ability to obtain the resources" necessary for full performance of the contract.

HAR §3-122-109 relating to the SQQ⁶, provides in relevant part:

Questionnaire. (a) The questionnaire shall request information for the following categories:

* * * *

⁵ By virtue of the Notice of Intention to Bid requirement, *HAR §§3-122-108* and *3-122-110* enable the procurement officer to begin evaluating the qualifications of potential bidders (including determining potential bidders to be nonresponsible) at the earliest possible time, presumably to expedite the awarding of the contract. Nevertheless, those sections do not *require* that the responsibility determination be completed prior to bid opening. On the other hand, the Hearings Officer's conclusion does not preclude the procuring agency from determining a bidder to be responsible or nonresponsible prior to bid opening upon the receipt of information sufficient to make such a determination or the bidder's failure to provide that information within a reasonable time after a request for such information is made.

⁶ *HRS §103D-310(b)* states in relevant part:

Whether or not an intention to bid is required, the procurement officer shall determine whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work. For this purpose, the officer, in the officer's discretion, may require any prospective offeror to submit answers, under oath, to questions contained in a standard form of questionnaire to be prepared by the policy board

(2) Material, equipment, facility, and personnel resources and expertise available, *or the ability to obtain them*, in order to meet contractual requirements;

* * * *

(Emphasis added).

Moreover, the Recommended Regulations to *The Model Procurement Code for State and Local Governments, Recommended Regulations (American Bar Association)(1997)*⁷, is instructive. *Regulation 3-401.01* provides that, “[a] determination of responsibility or nonresponsibility shall be governed by this Regulation.” *Regulation 3-401.03* entitled, **Ability to Meet Standards**, states:

The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:

(a) evidence that such contractor possesses such necessary items;

(b) *acceptable plans to subcontract for such necessary items*; or

(c) a documented commitment from, or *explicit arrangement with, a satisfactory source to provide the necessary items*.

(Emphasis added).

Based on these authorities and mindful of the Procurement Code’s purpose to foster broad-based competition, the Hearings Officer concludes that a bidder’s responsibility may be established by a sufficient showing that it possesses the ability to obtain the resources necessary to perform its contractual obligations. In this regard, the procuring agency’s determination will be given wide discretion and will not be interfered with unless the determination is unreasonable, arbitrary or capricious. *See King Cold Storage Warehouse, Inc. v. New Orleans, 522 So.2d 169 (La. Ct. App. 1988)*.

⁷ In enacting HRS Chapter 103D, the Legislature noted that “[a]fter careful review of various procurement models and thoughtful discussion and debate, your Committees agreed to use the American Bar Association’s (ABA) Model

Following bid opening, Respondent requested that KNG complete a SQQ. The completed SQQ contained detailed information regarding the responsibility of KNG and its intended subcontractors, including background information; work experience; description of the required equipment; financial arrangements and commitments; work plan outline including a plan for obtaining the necessary permits and licenses; financial statements; a joint venture agreement; a proposed lease; and letters of recommendation. In a letter dated February 9, 2000, KNG also informed Respondent that it had the necessary commitments to obtain the necessary equipment and had negotiated property leases. KNG also assured Respondent that it would be able to commence performance of the contract within 8 weeks. Moreover, as part of Respondent's evaluation of KNG's responsibility, the evidence indicated that Respondent checked with the City and County of Honolulu and was informed that the issuance of a license to collect refuse involved an inspection of the vehicles and that the process would take approximately one week.

Under these circumstances, the Hearings Officer cannot say that Respondent's determination was clearly erroneous, arbitrary, capricious, or contrary to law⁸. Accordingly, the Hearings Officer concludes that Respondent's finding that KNG was a responsible bidder was in accordance with the applicable laws.

IV. DECISION

For the reasons set forth herein, it is hereby ordered that:

1. Petitioner's Protest is dismissed; and
2. Each party shall bear its own attorney's fees, costs, and expenses.

Dated at Honolulu, Hawaii: JUN - 8 2000



CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

Procurement Code for State and Local Governments as their guide in establishing a comprehensive procurement system for Hawaii. *Standing Committee Report No. S8-93, 1993 Senate Journal, at 39.*

⁸ HAR §3-122-110(g).